No. 09-857

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANNE DOYLE,

Petitioner,

v.

LELAND GRASKE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should review the Eighth Circuit Court of Appeals' application of *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) in rendering an opinion consistent with the only two circuits having squarely addressed the issue of whether general maritime law affords loss of consortium damages for a nonseafarer injured beyond United States territorial waters. Contained within this analysis are the following:

1. Whether the policies underlying the congressional enactments upon which the Court relied in *Higgenbotham* and *Miles* are applicable to a claim for loss of consortium damages for injuries to a nonseafarer injured beyond the territorial waters of the United States.

2. Whether a state's interest which may allow application of state law remedies in territorial waters can extend to non-territorial waters of the United States where individual states have no interest.

3. Whether a defendant waives a defense which addresses a purely legal issue when the trial court and the circuit court both address the issue on its merits.

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BASIS FOR JURISDICTION

Respondent questions federal subject matter jurisdiction under admiralty law for the reason that this incident occurred approximately 300 yards from the shore of the Grand Cayman Island, within the inland waters of that nation. *See Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) (stating that "maritime law governs only those torts occurring on the navigable waters of the United States."). Respondent agrees with the chronology that Petitioner set forth in her Petition.

STATEMENT OF THE CASE

This case involves the purely legal question of whether general maritime law recognizes a loss of consortium cause of action for the wife of a non-seafarer[1] who is injured on foreign coastal waters.

Dan Doyle was injured when he fell out of a boat operated by the Respondent approximately 300 yards from the shore of the Grand Cayman Island. His wife, Anne Doyle, sought recovery for loss of consortium. The Eighth Circuit Court of Appeals reversed the

[1] "A 'nonseafarer' is someone . . . who is neither a seaman covered by the Jones Act, 46 U.S.C. § 30104, nor a longshore or harbor worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq. See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 n.2 (1996)." *Doyle v. Graske*, 579 F.3d 898, 905 (8th Cir. 2009).

judgment in favor of Anne Doyle, determining that general maritime law did not provide such a remedy for the spouse of a nonseafarer who was injured beyond the territorial waters of the United States.

REASONS FOR DENYING THE PETITION

I. No Split Exists Among The Decisions Of The Circuit Courts

The Court has addressed the availability of loss of consortium damages under general maritime law in four cases. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (recognizing a loss of consortium remedy arising from the death of a longshoreman killed in territorial waters); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (limiting *Gaudet* by refusing to recognize an action for loss of consortium in high seas wrongful death actions); *American Export Lines v. Alvez*, 446 U.S. 274 (1980) (extending *Gaudet* to a harbor worker injured in territorial waters); and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (explicitly limiting *Gaudet* to actions involving longshoremen in territorial waters). Taken together, these cases demonstrate that loss of consortium is available only in limited circumstances – where injury or death occurs to longshoremen/harbor workers in United States territorial waters. The situs of the injury and the status of the injured person are critical factors. Since *Gaudet*, *Alvez*, and *Miles* were decided, two circuits have addressed whether the spouse of a

nonseafarer who is injured beyond territorial waters has a claim for loss of consortium. *See Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) and *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994). Both determined that general maritime law bars such damages. Because no court of appeals has published any opinion to the contrary, the circuits are not divided on the issue raised in the petition for certiorari.

A. Only The Fifth And Ninth Circuits Have Addressed The Availability Of Loss Of Consortium Damages For The Spouse Of A Nonseafarer Injured Beyond United States Territorial Waters And Their Opinions Are Consistent

The Fifth and Ninth Circuits have squarely addressed whether loss of consortium damages are available to the spouse of a nonseafarer who is injured beyond the territorial waters of the United States. *See Chan v. Soc'y Expeditions, Inc.*, and *Nichols v. Petroleum Helicopters, Inc.*

In *Chan,* the petitioners were on a raft headed toward a coral atoll in French Polynesia when the raft overturned. The husband sustained physical injury and suit was brought for the physical injuries as well as loss of consortium.

Addressing the consortium issue, the Ninth Circuit said that it would "look for guidance to congressional enactments in the field of maritime law,

Supreme Court decisions, and relevant state legislation." *Id.* at 1407 (citing *Miles,* 498 U.S. at 27-28).

The court began its analysis by surveying several statutory and common-law remedial schemes applicable in admiralty actions: Death on the High Seas Act, 46 U.S.C. § 30302 *et seq.* ("DOHSA"), the Jones Act, 46 U.S.C. § 30104 *et seq.*, and *Sea-Land Services, Inc. v. Gaudet. Chan* at 1407. It noted, however, that none applied, because the husband had not died, was not a seaman, and had not been injured in state territorial waters.

Still, the court found DOHSA instructive. Observing that DOHSA limits recovery in high seas to pecuniary losses, the Ninth Circuit held that in the case of an injury occurring beyond state waters, "loss of consortium and society damages are not available . . . under general maritime law." *Id.* at 1407-08. "This conclusion," said the court, "serves the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in *Miles*." *Id.* at 1408. In reaching its decision, the court emphasized that to allow consortium claims for injuries on the high seas, but not for death on the high seas, "would effectively reward a tortfeasor for killing, rather than merely injuring his victim." *Id.*

Nichols, 17 F.3d 119, involved injury to a longshoreman who was injured beyond the territorial waters of the United States. Although the injury was to a longshoreman, the Fifth Circuit determined that maritime claims for loss of consortium can succeed

only where the plaintiff establishes both of the *Gaudet* criteria identified in *Miles*. *Nichols* at 123. Those two criteria are (1) the involvement of a longshoreman and (2) an injury in territorial waters. *Miles* at 31. Thus, the Ninth Circuit held that where a longshoreman's "injuries occurred outside territorial waters," his spouse's loss of consortium claim would fail because she could not "satisfy one of the two equally important requirements of *Gaudet* and *Alvez* as limited by *Miles*." *Nichols* at 123.

Since the only circuits that have addressed the availability of loss of consortium damages for a spouse injured beyond the United States territorial waters are the Fifth and the Ninth Circuits, and because those circuits are consistent with each other, no need exists for this Court to address the issue based upon a conflict among the circuits.

B. Neither The First, Second Nor Third Circuit Has Addressed The Availability Of Loss Of Consortium Damages For The Spouse Of A Nonseafarer Injured Beyond United States Territorial Waters

Anne Doyle claims that the First, Second and Third Circuits have allowed loss of consortium damages for plaintiffs in her position. She is mistaken. None of the cases on which Petitioner relies evidences a circuit split on whether consortium damages are available in admiralty when a non-fatal injury occurs beyond United States waters.

From the First Circuit, Petitioner cites *Lyon v. Ranger III,* 858 F.2d 22 (1st Cir. 1988). This case involved a death that occurred in United States territorial waters. The court did not address whether loss of consortium damages would be recoverable for a non-fatal injury beyond the United States territorial waters. In fact, the only discussion regarding loss of consortium damages is contained in the last sentence of the opinion which states: "In regard to the second matter [loss of consortium], we find the closeness of the Lyon family to be amply supported by record evidence." *Id.* at 30. Petitioner also refers to the First Circuit's decision in *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). That case concerned the availability of punitive damages, not loss of consortium. The court determined that an analogy between consortium damages and punitive damages could not be made in admiralty.

From the Second Circuit, Petitioner cites *Zicherman v. Korean Airlines Co. Ltd.*, 43 F.3d 18 (2d Cir. 1994) *aff'd in part, rev'd in part,* 516 U.S. 217 (1996). The issue in *Zicherman* was whether, under the Warsaw Convention, non-pecuniary damages were available for a death occurring on the high seas. In its decision, the court asserted that general maritime law permits recovery for loss of consortium, but it did so in the context of interpreting and applying the Warsaw Convention, which provides an exclusive cause of action when injuries occur on international flights. Purporting to apply "general maritime principles," the court concluded that "the Warsaw

Convention permits recovery for loss of society." *Id.* at 21 (citing *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 828-29 (2d Cir. 1994)). But this Court reversed the Second Circuit's decision and ruled the plaintiffs could not recover for loss of consortium because the deaths occurred on the high seas and DOHSA bars recovery of consortium damages. *See* 516 U.S. at 229-30. Petitioner also cites two unreported court cases, *Saunders v. Cunard Line, Ltd.*, 1995 WL 329323 (S.D.N.Y. 1995) and *Wartman v. Commodore Cruise Line*, 100 F.3d 943, 1996 WL 47964 (2d Cir. 1996). *Saunders* is a district court case that involved an injury that occurred in United States territorial waters. It did not address whether loss of consortium damages would be available beyond these territorial waters. In *Wartman*, the court did not discuss the differences between injuries in territorial waters and those beyond territorial waters. Rather, it summarily stated "under federal maritime law dependents may recover damages for loss of society . . . " Given the fact that this is an unreported decision devoid of any analysis, it cannot be interpreted for the broad proposition which Petitioner claims.

All three cases from the Third Circuit that Petitioner cites dealt with injury or death that occurred in United States territorial waters. *See New York & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3d Cir. 1912), *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986) and *Calhoun v. Yamaha Motor Corp., USA*, 40

F.3d 622 (3d Cir. 1994). *DeLoach* addressed a consortium claim by the child of a longshoreman injured in territorial waters. Petitioner states: "In that opinion it is clear that a spousal claim for consortium is cognizable under maritime law." (Petitioner's Brief, p. 8). Had the petitioner in *DeLoach* been the spouse of the injured longshoreman, then under *American Export Lines, Inc. v. Alvez*, recovery for loss of consortium would have been allowed. It would be the classic case of an injury to a longshoreman in territorial waters that *Alvez* specifically decided. The *DeLoach* court did not apply loss of consortium to a nonseaman who sustained an injury beyond United States territorial waters. In *Yamaha Motor Corp, USA*, the question addressed was whether a state remedy could be applied to an injury that occurred in United States territorial waters.

Neither the First, Second nor Third Circuits have analyzed whether loss of consortium damages are available to a nonseafarer spouse injured beyond United States territorial waters. Therefore, there is no circuit split for this Court to resolve.

II. General Maritime Law Does Not Provide A Remedy For Loss Of Consortium Arising From Injury To A Nonseafarer Beyond United States Territorial Waters

Both DOHSA, which provides a statutory cause of action for death on the high seas, and the Jones Act, which provides a statutory right of action to

injured seamen, limit recovery to pecuniary damages. In other words, these statutes bar recovery of non-pecuniary damages, such as loss of consortium. While neither statute governs this case, they each provide guidance to the Court in determining what remedies are available under general maritime law. "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles." *Miles*, 498 U.S. at 24. Indeed, the policies underlying federal legislation were the Court's guiding light in *Miles*:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Id. at 27.

In *Miles*, a mother sought loss of consortium damages arising out of the death of her son when he was stabbed to death by a fellow crew member within the territorial waters of the United States. *Id.* at 19. In determining that a loss of consortium remedy did

not exist, the Court examined the principles underlying DOHSA, even though the death occurred in territorial waters. *Id.* at 24. The Court noted that DOHSA was a "manifestation of congressional intent 'to achieve uniformity in the exercise of admiralty jurisdiction.'" *Id.* at 26, *quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The Court concluded that "Congress has spoken directly to the question of recoverable damages on the high seas, and 'when it does speak directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless.'" *Id.* at 31, *quoting Higginbotham*, 436 U.S. at 625.

Applying this uniformity principle to the present facts, there is no rational basis to allow loss of consortium damages for non-fatal injuries arising beyond the territorial waters of the United States. As aptly pointed out by the Eighth Circuit, to allow such damages would create at least two anomalies: (1) spouses of non-fatally injured persons could recover loss of consortium damages, but spouses of fatally injured persons could not; and (2) spouses of injured seamen covered under the Jones Act could not recover loss of consortium damages, but spouses of nonseamen could. "It would be odd if the relief available to the spouse of a nonseafarer were more expansive than that which Congress has afforded the spouse of a seaman. After all, the principles of maritime law have always included 'a special solicitude for the welfare of seaman and their families.'" *Doyle v. Graske,* 579 F.3d 898, 907 (8th Cir. 2009), *quoting*

Miles, 498 U.S. at 36. *See also Alvez*, 446 U.S. at 281, extending *Gaudet* to non-fatal injuries in territorial waters because "[t]here is no apparent reason to differentiate between fatal and non-fatal injuries in authorizing the recovery of damages for loss of society." Petitioner asks this Court to grant certiorari for the purpose of creating such anomalies. But, as the Eighth Circuit rightly concluded, policy and precedent augur against doing so.

Atlantic Sounding Co., Inc. v. Townsend, 129 S.Ct. 2561 (2009), does not support the proposition that due to the lack of federal legislation, loss of consortium is available in this case (Petition p. 11). In *Townsend*, this Court analyzed the steps it took in *Miles* to reach its decision that loss of consortium was unavailable for the death of a seaman in territorial waters. It stated:

> The Court in *Miles* first concluded that the "unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes" authorizing maritime wrongful-death actions, supported the recognition of a general maritime action for wrongful death of a seaman. *Id.*, at 24, 111 S.Ct. 317 (discussing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which overruled *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)). Congress had chosen to limit, however, the damages available for wrongful-death actions under the Jones Act and DOHSA, such that damages were not

> statutorily available for loss of society or lost future earnings. See *Miles,* 498 U.S., at 21, 31-32, 111 S.Ct. 317. The Court thus concluded that Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law, *id.,* at 32-36, 111 S.Ct. 317.

Id. at 2752. The *Townsend* Court concluded that "[t]he reasoning of *Miles* remains sound." *Id.* It was the application of that reasoning with which the *Townsend* Court disagreed because *Townsend* involved the availability of punitive damages in a maintenance and cure action. *Id.* The Jones Act did not address punitive damages, so the allowance of such a remedy did not violate the congressional intent underlying the Act. *Id.* DOHSA, on the other hand, specifically limited recovery to "pecuniary" damages, so it was appropriate to apply that policy limitation to the plaintiff in *Miles* who was seeking non-pecuniary damages for her husband's death in territorial waters.

The rationale of *Miles* is equally applicable in the present case. Petitioner's husband was injured in non-territorial waters. Just as the policy reasons underlying DOHSA apply to death in territorial waters, they also apply to injuries on the high seas. Federal maritime law does not provide Petitioner with a remedy.

III. State Law Remedies Are Available Only In Territorial Waters

Petitioner is not entitled to a state law remedy that is foreclosed by federal law. Petitioner relies heavily upon the Third Circuit decision in *Calhoun v. Yamaha Motor Corp., U.S.A.*, but fails to recognize that *Yamaha* involved an incident that occurred in state territorial waters. The references in *Yamaha* to state-court remedies almost always include the limiting caveat that such remedies may apply in cases arising in territorial waters. The court said, for example:

- "extending state wrongful death statutes to fatal accidents in **territorial waters** was compatible with substantive maritime policies";
- "state survival statutes may be applied in cases arising out of accidents in **territorial waters**";
- "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their **territorial waters**"; and
- "we preserve the application of state statutes to deaths within **territorial waters**."

Id. at 624, 628, 628 n.13 (emphasis added). At no point in its written decision did the court assert that a state's statutes, remedies, or interests in regulating activity extend beyond territorial waters.

Yamaha, therefore, does not support the proposition that a plaintiff may pursue a state-law remedy for lost consortium in a cause of action arising from injury that occurs beyond United States waters. The law is, in fact, to the contrary. As Professor Schoenbaum has explained, "[T]he state of the law at the present time seems to be that **loss of society/consortium is not available under the general maritime law**, but may be recovered under the *Yamaha* doctrine for deaths and injuries in state waters." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-16 (4th ed. 2004) (emphasis added). The remaining cases cited by Petitioner also involve state supplementation in actions arising on territorial waters, and are, therefore, inapposite.

Petitioner is mistaken when she says that "applying Nebraska's remedy for loss of consortium would do nothing to undermine admiralty law." One of the driving forces for the Court's development of federal admiralty law is uniformity. *See Miles*, 498 U.S. at 27, 33. To allow state supplementation of federal admiralty law beyond the territorial waters of that state would destroy the uniformity which the Court seeks to maintain. Discussing the recognition of a state damage remedy for a death that occurred on the high seas, the Court explained:

> [T]he questionable practical significance of this difference in recovery, see *Mobil Oil Corp. v. Higginbotham, supra,* 436 U.S. at 624, and n. 20, 98 S.Ct., at 2014, and n. 20 is far overshadowed by the potential for serious

> conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986). State law remedies have no application outside territorial waters.

IV. Graske Did Not Waive His Objection To Anne Doyle's Claim

Whether a party has waived an argument by raising it for the first time on a Motion for Reconsideration, is a question of prudence and is not jurisdictional. *See Official Comm. Of Unsecured Creditors of Color Tile Inc. v. Coopers and Lybrand, LLP,* 322 F.3d 147, 159 (2d Cir. 2003). The availability of a loss of consortium claim to a spouse of a nonseaman while on the high seas is a "pure question of law." *Murray v. Anthony J. Bertucci Const. Co., Inc.,* 958 F.2d 127 (5th Cir. 1992). A district court has broad discretion to address a purely legal issue. *J.C. v. Regional School Dist. 10 Bd. of Educ.,* 278 F.3d 119, 125 (2d Cir. 2002).

Graske raised the issue of the viability of a loss of consortium claim by denying liability for Petitioner's loss of consortium claim in the district court (Petitioner's App. 60). He also raised the issue in his

Motion to Amend Findings of Fact and Conclusions of Law (*Id.* 59). Both parties briefed the issue before the district court made its final ruling and the district court addressed the issue on the merits (*Id.* 60-65). Furthermore, the parties were given a second opportunity to brief and argue the issue in the appeal to the Eighth Circuit. The Eighth Circuit also addressed the issue on the merits (*Id.* 11-19). Where the parties have had a full opportunity to address a pure question of law, a court does not abuse its discretion when it addresses the issue, even if it is first raised on appeal. *Murray,* 958 F.2d at 129 and *Nelson v. City of Moss Point, Mississippi,* 674 F.2d 379, 387 n.13 (5th Cir. 1982), *rev'd en banc on other grounds,* 701 F.2d 556 (5th Cir. 1983).

The district court and the Eighth Circuit acted within their discretionary powers in addressing the loss of consortium issue. Graske did not waive this defense.

CONCLUSION

Only two circuit courts have addressed the availability of loss of consortium damages arising out of non-fatal injuries to a nonseafarer sustained beyond the territorial waters of the United States. Both of those courts agree that federal maritime law does not allow recovery. Congressional enactments, although not preemptive, provide guidance in the development of federal maritime common law. These

congressional enactments provide the underlying principles upon which the Eighth Circuit Court of Appeals' decision was based.

The Eighth Circuit Court of Appeals' decision does not conflict with a decision of any other circuit court and conforms to relevant decisions of this Court. Anne Doyle's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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